representatives. Copyright Owners moved to strike these affidavits, and SBCA opposed. The Register's recommendation of a January 1, 1998, effective date has mooted the issue. The Register does recommend, however, that the affidavits be stricken. The record is closed in this proceeding by order of August 14, 1997, section 251.55 does not permit submission of additional evidence. Although the matter of the effective date is for the Librarian, and not the CARP, to decide, such affidavits could only be accepted if the Librarian determined that the record needed to be reopened to take additional testimony. Since the matters discussed in SBCA's affidavits are moot, the Register recommends that they be stricken.

G. Additional Issues Raised by SBCA

SBCA raises several additional issues in its Petition to Modify. Because these issues all relate to evidence not adduced during the course of the proceeding, and the weight to be accorded evidence that was adduced, they are addressed together.

1. The first issue involves the history of retransmission consent negotiations under the communications law. Under retransmission consent, an MVPD must obtain the permission of a broadcaster before the MVPD can retransmit the broadcaster's signal to the MVPD's subscribers. Retransmission consent negotiations took place between the cable industry and broadcasters in 1993 and 1996. SBCA attempted to show that little compensation was obtained by broadcasters for permission to retransmit their signals in an effort to prove that the fees under the section 111 license represent actual fair market value. The Panel stated that "[w]e agree that these retransmission consent negotiations are relevant to a determination of fair market value and represent potentially probative evidence. Unfortunately, the evidence adduced is so vague and replete with qualifiers as to provide little guidance." Panel Report at 34. The Panel noted cross-examination testimony of Ms. McLaughlin and Mr. Gerbrandt indicating that some compensation was paid, but also noted that Mr. Shooshan's and Mr. Haring's testimony discussed retransmission consent negotiations only in the context of local, and not distant, retransmissions. *Id.* at 35. The Panel concluded that the "testimony upon which SBCA relies lacks sufficient scope and specificity to rebut or modify the PBS-McLaughlin analysis." *Id.*

SBCA submits that it could not present further evidence on the compensation received by copyright owners and broadcasters for retransmission consent negotiations because "discovery procedures do not allow the Carriers to determine those amounts." SBCA Petition to Modify at 35. SBCA asserts that the failure to present such information "should not be then turned against the Carriers to say that the retransmission consent negotiations cannot be properly quantified." *Id.*

Copyright Owners contend that the Panel correctly evaluated the evidence of retransmission consent negotiations and found it unavailing in making an adjustment to the benchmark. Copyright Owners Reply at 27–31.

2. The second issue involves the issue of the costs incurred by cable networks in assembling the clearances for their programming. SBCA attempted to show at hearing that copyright owners do not have costs in the broadcast signal retransmission context, and therefore an appropriate downward adjustment of the benchmark must be made. The Panel stated that the clearance costs in the cable network arena are unknown, but did not agree that a downward adjustment of the benchmark was required:

> In a hypothetical free market, it is quite conceivable that the higher the costs broadcasters must pay to clear their signals for DTH[17] distribution, the higher the royalty rates they would charge satellite carriers. Accordingly, the impact of high clearance costs on fair market value (based upon a hypothetical free market analysis) could be positive rather than negative. No adjustment to the cable network benchmark is required.

Panel Report at 41.

SBCA argues that it could not determine the costs to copyright owners for clearances of cable networks since such information was not within the scope of discovery, and therefore one should not assume, as the Panel did, that such costs could automatically be shifted to satellite carriers. SBCA Petition to Modify at 30.

Likewise, SBCA argues that it could not quantify at hearing the added benefit that satellite retransmission gives copyrighted programming (digital picture quality, inclusion in electronic guides) because of "the absence of any ability to take discovery." *Id.* at 31–32. The Panel determined that "no quantifiable benefit was identified and no evidence adduced" to demonstrate added value by satellite retransmission." Panel Report at 40. SBCA asserts that "the Panel held the Carriers to an unworkable standard of proof." SBCA Petition to Modify at 32.

In reply, Copyright Owners contend that the Panel acted correctly. Copyright Owners Reply at 24–27.

3. A third issue involves quantifying the effect on advertising revenues and superstation fees of satellite retransmissions of broadcast signals. SBCA asserts that they quantified "as well as could be in a regime which denies discovery" that advertising revenues are higher because copyright owners known that their programming reaches a wider audience due to satellite retransmission. SBCA Petition to Modify at 36. Likewise, SBCA asserts that "superstation taxes"—the amounts charged to broadcasters by copyright owners—are greater, particularly in the sports context, because copyright owners know that satellite retransmissions result in greater viewership. *Id.* at 37–38. SBCA presented evidence that both the professional baseball and basketball leagues extracted additional compensation from WGN in Chicago and WTBS in Atlanta—both superstations known to be widely distributed on satellite—though the amount was not quantified. SBCA Proposed Findings of Fact and Conclusions of Law at 72–73.

The Panel addressed the potential for increased advertising revenue due to satellite retransmissions, stating:

> The fundamental mission of broadcasters is to expand their audiences to maximize advertising revenues. At their own expense and risk, the satellite carriers developed a DTH market which expands the broadcasters [sic] reach at no cost to the broadcasters. However, we agree that no empirical evidence demonstrating an increase in advertising revenues was adduced. Though the broadcasters (and hence the copyright owners) clearly benefit from expanded reach, these benefits may not be amenable to measurement and quantification. The copyright owners further argue that because most basic cable networks also advertise, to the extent that broadcasters to benefit from expanded reach, the benefit is already reflected in the cable network benchmark. We agree *to a point.* Broadcast stations rely upon advertising revenue to a much greater extent than do cable networks (excepting those cable networks which command very low or even negative royalty fees). It naturally follows that the benefits which accrue to broadcasters have *not* been *fully* reflected in the cable network benchmark price. Though some downward adjustment from the copyright owners *general* approach seems appropriate, we are unable to quantify such an adjustment. However, our decision to adopt the most conservative approach (PBS-McLaughlin) reflects this consideration.

Panel Report at 36–37. The Panel did not use the term "superstation tax" in its discussion.

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[17] "DTH" stands for "direct to home."

SBCA complains that the Panel ignored its evidence of increased revenues from satellite retransmissions, and that it is "no excuse that the [o]wners refused to divulge the extent of the compensation." SBCA Petition to Modify at 38. SBCA asserts that not subtracting this added value from the benchmark would result in "vastly overcompensat[ing]" copyright owners. *Id.*

In reply, Copyright Owners assert that the Panel correctly determined that, while such revenues might conceptually result in a downward adjustment, SBCA failed to quantify such an adjustment. Copyright Owners Reply at 31.

4. The fourth issue concerns the impact of increased royalty fees on the satellite industry and the continued availability of retransmitted broadcast signals. The Panel accepted Ms. McLaughlin's testimony that the 27 cent fee would not significantly adversely impact satellite:

> Although Ms McLaughlin did not perform a demand elasticity study, she testified that after the 1992 rate increases, the number of broadcast stations retransmitted and the percentage of satellite subscribers to retransmitted broadcast signals remained constant. She concluded that despite an increase in the compulsory license rate to $0.27 per subscriber per month, the number of subscribers to retransmitted broadcast stations would continue to grow at substantially the same rate as the number of satellite subscribers generally. Ms. McLaughlin also examined the retail prices charged by satellite distributors and concluded that if the rates for retransmitted broadcast signals were increased to $0.27 per subscriber per month and *not* passed on to subscribers, those rates would constitute only 30% of the average retail prices charged to subscribers leaving sufficient profit margin for the satellite carriers to avoid significant adverse impact to them or their subscribers.
>
> Again, we recognize that *any* rate increase, particularly if rates are set above those paid by their entrenched competitor, tends to adversely impact the satellite carriers. However, the satellite carriers did not attempt to quantify the impact of increased rates and adduced no credible evidence that the availability of secondary transmissions would be interrupted. Accordingly, we conclude that a rate increase to $0.27 per subscriber per month would have no significant adverse impact upon the satellite carriers or the availability of secondary transmissions to the public.

Panel Report at 46–47 (citations omitted).

SBCA contends that the Panel had no evidence upon which to base its conclusion that a dramatic rate increase would not adversely affect satellite carriers and their subscribers. SBCA Petition to Modify at 42. Rather, SBCA asserts, the evidence, including that relied upon by Ms. McLaughlin, "shows that satellite carriers have yet to earn a profit, especially in the DBS market, and that the C-Band market is waning." *Id.* SBCA notes that Ms. McLaughlin did not perform a demand elasticity analysis for increased rates, and that her testimony that the 1992 rate increase did not impact subscriptions or the number of signals carried was not based upon anything in the record. *Id.* at 42–43. SBCA also mentions that the 1992 panel reduced its initial rate increase because of a concern for disruptive impact. 57 FR 19061.

SBCA also charges that the Panel ignored its evidence regarding the disruptive impact of a rate increase. It points to the testimony of Mr. Parker who stated that there is a limit on the package rate to be charged consumers, and that satellite carriers have traditionally gone back to cable networks to demand concessions in order to keep prices down. SBCA Petition to Modify at 44. SBCA argues that any increases in the rates should be examined in light of the impact lower fees would have on copyright owners. According to SBCA, there is no evidence that suggests that the current fees of section 119 have any adverse impact on the copyright and broadcast industries. *Id.* at 45.[18]

In reply, Copyright Owners assert that it was completely within the discretion of the Panel to accord weight to Ms. McLaughlin's testimony that satellite carriers would not be adversely impacted by the increased royalty rates. Copyright Owners Reply at 36. Copyright Owners argue that Mr. Parker's testimony is nonspecific, and that the testimony of Mr. Edwin Desser and Mr. James Trautman show that satellite carriers are owned by large corporate enterprises that can well afford the proposed rate increase. *Id.* at 39–40.

Recommendation of the Register

The Register is addressing these four arguments presented by SBCA together because they contain a common thread: the absence of evidence adduced before the Panel and, where evidence was produced, the weight and sufficiency to be accorded it.

Given the limited scope of the Librarian's review in this proceeding, "the Librarian will not second guess a CARP's balance and consideration of the evidence, unless its decision runs completely counter to the evidence presented to it." 61 FR 55663 (Oct. 28, 1996) (citing *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983). In the case of the impact of a rate increase on the satellite industry, the Panel chose to accord weight to Ms. McLaughlin's testimony that her proposed rate increase would not adversely affect the satellite industry, rather than Mr. Parker's testimony. It was clearly within the Panel's discretion to do so. There is record testimony that supports the Panel's conclusion, and the Librarian's review need go no further. *Recording Industry Ass'n of America, Inc.* v. *CRT*, 662 F.2d 1, 14 (D.C. Cir. 1981) (decision must be upheld where decisionmaker's path may reasonably be discerned).

The remaining issues contested by SBCA—the impact of retransmission consent negotiations, added value from digital picture/electronic guides and avoidance of clearance costs, and increased advertiser revenue and compensation from expanded markets—predominately involve the matter of evidence not presented to the CARP. In essence, SBCA contends that if the discovery rule of 37 CFR 251.45(c)(1) were broader, if could have presented evidence to the Panel on these issues that would have caused the Panel to reduce the 27 cent royalty fee. Instead, according to SBCA, the Panel punished it for failure to present the necessary evidence to quantify the reductions, and the 27 cent rate, consequently, is unfairly high.

Section 251.45(c)(1) of the rules provides that, after the exchange of the written direct cases, a party "may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony." 37 CFR 251.45(c)(1). The Librarian has clarified that discovery is limited in CARP proceedings:

> Discovery in CARP proceedings is intended to produce only the documents that underlie the witness' factual assertions. It is not intended to augment the record with what the witness might have said or put forward, or to range beyond what the witness said. Any augmentation of the record is the prerogative of the arbitrators, not the parties.

Order in Docket No. 94–3 CARP CD 90–92, 1–2 (October 30, 1995). There are several reasons for the limited discovery practice. CARP proceedings are relatively short in duration (180 days) and, like this proceeding, begin and end according to statutorily specified deadlines. There is not sufficient time to conduct wide-ranging discovery,

[18] Regarding the economic impact of royalty fees on copyright owners, the Panel stated that "[t]he parties devoted little hearing time to this issue." Panel Report at 46. The Panel did "accept the obvious, general notion that higher royalty rates provide greater incentive to copyright owners while lower rates would render broadcast stations a * * * less attractive vehicle at the margin for program supplies.'" *Id.* (citation omitted).

particularly where, as in the case, the litigation is quite complex and involves the technically-oriented testimony of numerous witnesses. There are also cost considerations. Broad discovery rules would considerably increase the cost of CARP proceedings, without necessarily producing a corresponding increase in the quality of the evidentiary presentations. The parties may, therefore, as of right only request documents which underlie a witness's factual assertions.

The rules do not, however, prohibit a party, once the CARP has begun, from petitioning the Panel to take discovery on an issue or issues that it believes are critical to the resolution of the proceeding. As noted above, augmentation of the record is the prerogative of the CARP, and the Panel has the discretion to decide whether or not to allow additional discovery beyond that of section 251.45(c)(1). *See* 37 C.F.R. 251.42 (CARP may waive the rules upon a showing of good cause). SBCA complains that the Panel might have reduced the royalty rates based on the issues it raised had it allowed additional discovery. Yet, SBCA never petitioned the Panel to take such discovery. The Panel cannot be faulted for not reopening the record and allowing additional discovery when it was asked to do so. *See National Ass'n of Broadcasters* v. *CRT*, 772 F.2d 922, 936–937 (D.C. Cir. 1985) (claimant failed to petition Tribunal to allow it to adduce additional evidence regarding opposing party's alleged lack of copyright ownership).

The issue remains as to whether the Panel should have reopened the record, on its own motion, and allowed SBCA to take discovery on the issues it rates: i.e. whether it was arbitrary for the Panel not to do so. In the Register's view, the Panel did not act arbitrarily. Regarding the value of retransmission consent negotiations, the Panel found that Ms. McLaughin, and Messrs. Gerbrandt, Shooshan and Harin offered testimony regarding the probative value of retransmission consent negotiations on the fair market value of retransmitted broadcast signals. Panel Report at 34–35. The Panel found this testimony to be unsupportive of the proposition that retransmission consent negotiations affected the fair market value analysis. *Id.* at 35. Because there is record evidence to support the Panel's determination, the Panel did not act arbitrarily.

With regard to the purported added value to broadcast signals by satellite retransmission in digital format, and attractive electronic guides provided the subscribers, the Panel determined that "no quantifiable benefit was identified and no evidence adduced that this benefit would materially affect fair market value * * *." Panel Report at 40. As the Copyright Owners correctly point out, any added value from digital picture quality and electronic guides would occur for both broadcast and cable network programming. Copyright Owners Reply at 25. SBCA could have presented evidence that demonstrated that satellite carriers pay a lower fee for licensing cable networks as a result of digital picture quality and electronic guides provided by the carriers. Such evidence, if it exists, is in the sole possession of the satellite carriers. SBCA presented no such evidence. The Panel, therefore, cannot be faulted from finding no evidence to support added value from these items.

Regarding clearance costs saved by broadcasters and copyright owners from satellite retransmissions, the Panel stated:

> SBCA further argues that in a free market, it would be virtually impossible for satellite carriers to negotiate directly with every copyright owner of every program contained in each day's signal they retransmit. Accordingly, they reason, broadcasters would invariably by compelled by market forces to clear all rights and negotiate with satellite carriers for retransmission of their entire signals. Those costs which the broadcasters would incur in purchasing the clearances are unknown. Hence, SBCA concludes that the section 119 rates should not be raised without considering the broadcasters' cost savings. We tend to agree with both of SBCA's premises but not its conclusion. In a hypothetical free market, it is quite conceivable that the higher the costs broadcasters must pay to clear their signals for DTH distribution, the higher the royalty rates they would charge satellite carriers. Accordingly, the impact of higher clearance costs on the fair market value (based upon a hypothetical free market analysis) could be positive rather than negative. No adjustment to the cable network benchmark is required.

Panel Report at 41.

SBCA contends that Copyright Owners never put on any evidence demonstrating their cost savings, and it should not therefore be presumed that clearance costs would be passed on to satellite carriers. SBCA Petition to Modify at 30. SBCA's argument, however, is one of emphasis rather than evidence. SBCA asked the Panel to quantify what the average cost *might* be, in a *hypothetical market*, for clearance costs, and how satellite carriers and broadcasters *might* allocate such costs. Not surprisingly, SBCA does not indicate what, if any evidence, would conclusively demonstrate what such costs might be, or who might bear them.[19] It is not reversible error for the Panel to reason that in a marketplace which does not exist, clearance costs might have a positive effect on the cable network benchmark, rather than a negative one.[20]

Finally, with regard to the purported increase in advertising revenues and compensation from expanding coverage of broadcast signals by satellite retransmission, the Panel found that it could not quantify any potential reductions of the cable network benchmark. Panel Report at 37. While allowing SBCA expanded discovery on these points might have assisted the Panel in quantifying a downward adjustment to the cable network benchmark, the Register cannot determine anything in the record that compelled it. Furthermore, the Panel did conclude that its choice of the "conservative" PBS/McLaughlin cable network benchmark reflected its inability to quantify any increased advertising revenues that copyright owners might receive from expanded markets through satellite retransmission. *Id.* In the Register's view, the Panel's action was the product of rational decisionmaking.

H. Conclusion

Having fully analyzed the record in this proceeding and considered the contentions of the parties, the Register recommends that the Librarian of Congress adopt the royalty rate, effective January 1, 1998, of 27 cents per subscriber per month for retransmission of any distant superstation and network signals by satellite carriers to subscribers for private home viewing.

In addition, the Register recommends that the Librarian not adopt any royalty fee for the local retransmission of superstation signals, as defined under 17 U.S.C. 119(d)(11), and for the local retransmission of a network signal, as defined under § 119(d)(11), to any subscriber residing in an unserved household, as defined in § 119(d)(10).

Finally, the Register recommends that the petition to modify the Panel's decision filed by EchoStar be dismissed, and the motion of Copyright Owners to dismiss attachment A of SBCA's petition to modify (and the

[19] SBCA does cite a statement of FCC Commissioner Dennis that broadcasters might have to bear these costs. SBCA Petition to Modify at 30 (citing "In re Compulsory Copyright License for Cable Retransmissions," 4 FCC Rcd. 6711 (1989) (Commissioner Dennis, concurring). However, Commissioner Dennis' statement is speculative, describing what might happen to broadcasters "in some cases," 4 FCC Rcd. at 6711, and is far from conclusive evidence.

[20] In fact, the Panel did not make any change to the benchmark for clearance costs.

accompanying argument and discussion) be granted.

Order of the Librarian

Having duly considered the recommendation of the Register of Copyrights regarding the Report of the Copyright Arbitration Royalty Panel in the matter of the adjustment of the royalty rates for the satellite carrier compulsory license, 17 U.S.C. 119, the Librarian of Congress fully endorses and adopts here recommendation to accept the Panel's decision in part and reject it in part. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing this order, and amending the rules of the Library and the Copyright Office, announcing the new royalty rates for the section 119 compulsory license.

The Librarian is also dismissing the petition to modify filed by EchoStar, and is dismissing the affidavits contained in attachment A of SBCA's petition to modify, and the accompanying discussion and argument.

List of Subjects in 37 CFR Part 258

Copyright, Satellites, Television.

Final Regulation

In consideration of the foregoing, the Library of Congress amends part 258 of 37 CFR as follows:

PART 258—ADJUSTMENT OF ROYALTY FEE FOR SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS

1. The authority citation for part 258 continues to read as follows:

Authority: 17 U.S.C. 702, 802.

2. Section 258.3 is revised to read as follows:

§ 258.3 Royalty fee for secondary transmission of broadcast stations by satellite carriers.

(a) Commencing May 1, 1992, the royalty rate for the secondary transmission of broadcast stations for private home viewing by satellite carriers shall be as follows:

(1) 17.5 cents per subscriber per month for superstations.

(2) 14 cents per subscriber per month for superstations whose signals are syndex-proof, as defined in § 258.2.

(3) 6 cents per subscriber per month for network stations and noncommercial educational stations.

(b) Commencing January 1, 1998, the royalty fee for secondary transmission of broadcast stations for private home viewing by satellite carriers shall be as follows:

(1) 27 cents per subscriber per month for distant superstations.

(2) 27 cents per subscriber per month for distant network stations.

(3) No royalty rate (zero) for a superstation secondarily transmitted within the station's local market, as defined in 17 U.S.C. 119(d)(11).

(4) No royalty rate (zero) for a network station secondarily transmitted within the station's local market, as defined in 17 U.S.C. 119(d)(11), to subscribers residing in unserved households, as defined in 17 U.S.C. 119(d)(10).

Dated: October 23, 1997.
So Ordered.

James H. Billington,
The Librarian of Congress.

[FR Doc. 97–28543 Filed 10–27–97; 8:45 am]

BILLING CODE 1410–33–M

DEPARTMENT OF DEFENSE

DEPARTMENT OF TRANSPORTATION

Coast Guard

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AI69

Miscellaneous Educational Revisions

AGENCIES: Department of Defense, Department of Transportation (Coast Guard), and Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the educational assistance and educational benefit regulations of the Department of Veterans Affairs (VA). It removes a number of provisions that no longer apply or otherwise have no substantive effect, and makes other changes for the purpose of clarification.

DATES: This final rule is effective October 28, 1997.

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer, Assistant Director for Policy and Program Administration, Education Service, Veterans Benefits Administration, 202–273–7187.

SUPPLEMENTARY INFORMATION: This document affects 38 CFR part 21, subparts C, D, G, H, K, and L. It removes provisions that are obsolete, duplicative, or otherwise without substantive effect, and makes changes for the purpose of clarification. This document makes no substantive changes. Accordingly, there is a basis for dispensing with prior notice and comment and delayed effective date provisions of 5 U.S.C. 552 and 553.

The Department of Defense (DOD) and VA are jointly issuing this final rule insofar as it relates to the Post-Vietnam Era Educational Assistance Program (VEAP) and the Educational Assistance Test Program (EATP). These programs are funded by DOD and administered by VA. DOD, the Department of Transportation (Coast Guard), and VA are jointly issuing this final rule insofar as it relates to the Montgomery GI Bill—Selected Reserve program. This program is funded by DOD and the Coast Guard, and is administered by VA. The remainder of this final rule is issued solely by VA.

The Secretary of Defense, the Commandant of the Coast Guard, and Acting Secretary of Veterans Affairs hereby certify that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule makes no substantive changes. Pursuant to 5 U.S.C. 605(b), this final rule, therefore, is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance numbers for programs affected by this final rule are 64.117, 64.120, and 64.124. This document also affects the Montgomery GI Bill—Selected Reserve program which has no Catalog of Federal Domestic Assistance number.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Education, Employment, Grant programs-education, Grant programs-veterans, Health care, Loan programs-education, Loan programs-veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

3

Before the
Library of Congress
Copyright Office
Washington, D.C. 20540

Public Hearings Concerning the Revision of the Cable and Satellite Carrier Compulsory Licenses	))))	Docket No. 97-1

WRITTEN TESTIMONY

OF

ST. CROIX CABLE TV

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April 26, 1997

reviewing court.[15]

The FCC and the courts recognized the substantial public interest in increased carriage of distant independent stations in smaller markets. Still, the Copyright Office's rules continue to penalize smaller market SA3 filers.

3. The Copyright Office continues to apply the pre-1980 rules.

Although the FCC repealed its restrictions on distant signals, the Copyright Office continues to base the 3.75% fee liability on the old rules. This forces cable systems serving smaller markets to pay substantially higher copyright fees. No justification for this anomaly exists.

The next section demonstrates the inequity of the current treatment for cable systems serving small markets.

B. St. Croix Cable and its customers must pay over 385% more in copyright royalties only because they reside in a small market.

1. St. Croix Cable now pays over $61,000 in copyright royalties per reporting period.

For the 96/2 reporting period, St. Croix Cable paid about $61,639 on gross revenues of about $710,578.[16] This equates to a per subscriber copyright cost of $0.81 per month. Over 85% of this cost arises from the two superstations carried by St. Croix that the Copyright Office considers "non-permitted." St. Croix Cable believes that few, if any, U.S. cable systems pay this much per subscriber in copyright royalties. The only reason that St. Croix Cable pays this much is because it serves a smaller market.

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[15] 652 F.2d at 1152.

[16] Exhibit 2, 96/2 SA3 (actual), p. 7.

2. **Moved to Miami, St. Croix Cable would pay about $16,000 in copyright royalties.**

Using the same data from the 96/2 reporting period, assume St. Croix Cable served Miami, the closest major television market.[17] In this case, the three super stations carried by the system would qualify as permitted signals. Copyright costs to the cable operator and its customers would drop substantially.

If moved to Miami, St. Croix Cable would pay about $16,346 for the 96/2 reporting.[18] This equates to about $0.21 per subscriber per month, solely due to geographic location.

3. **Moved to Puerto Rico, St. Croix Cable would pay about $16,000 in copyright royalties.**

Puerto Rico, only 80 miles from St. Croix, offers an equally irrational comparison.[19] <u>No cable system in Puerto Rico pays a 3.75% fee for any distant signal</u>. All superstations and other distant independents qualify as "specialty station" programming under current Copyright Office policy. WTBS, WGN, WOR and others, all English language programming, <u>the same superstations for which St. Croix Cable and its customers pays the 3.75% fee</u>, incur no additional copyright fees for Puerto Rico cable systems.

If moved to Puerto Rico, St. Croix Cable would pay about $16,346 for the 96/2 reporting.[20] The equates to about $0.21 per subscriber per month, solely due to geographic location.

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[17]Exhibit 3, 96/2 SA3 (Miami pro forma).

[18]Exhibit 3, p. 7.

[19]Exhibit 4, 96/2 (SA3) (Puerto Rico pro forma).

[20]Exhibit 4, p. 7.

The following chart shows the disparity:

System Location	Distant Signals Carried	Gross Receipts	Subscribers	Royalties	Cost per Customer per Month
St. Croix, USVI	WTBS, WGN, WOR, WRAL, WNBC	$710,578	12,716	$61,639	$0.81
Miami	WTBS, WGN, WOR, WRAL, WNBC	$710,578	12,716	$16,347	$0.21
Puerto Rico	WTBS, WGN, WOR, WRAL, WNBC	$710,578	12,716	$16,347	$0.21

The bottom line: St. Croix Cable and its customers must pay over <u>385% more in copyright fees for the same programming</u>.

C. No law or policy justifies imposing greater copyright burdens on cable systems serving smaller markets.

Congress enacted Section 111 for two principal reasons: (1) to fairly compensate copyright owners; and (2) to reduce transaction costs.[21] Nowhere does the statute, the legislative history or interpretive case law say that the Copyright Office should administer Section 111 to impose disparate copyright burdens on small market cable systems and their customers. Moreover, Congress expressly authorized the Copyright Office to adjust copyright royalties if the FCC changed its pre-1980 distant signal rules.[22] Still, the disparate treatment of smaller market cable systems continues.

The FCC adopted its pre-1980 market quota rules to help preserve local programming in smaller markets. These rules came out in 1972 - before the proliferation of superstations and

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[21] *Cablevision Systems Development Co. v MPAA*, 836 F.2d 599, 602 (D.C. Cir. 1988).

[22] 17 U.S.C. § 801(b)(2)(B).

Attachment A

DOCUMENT OFF-LINE

This page has been substituted for one of the following:

o An oversize page or document (such as a map) which was too large to be scanned into the RIPS system.

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/o Other materials which, for one reason or another, could not be scanned into the RIPS system.

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1 Diskette